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NO. (13)

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. Pursuant to the Initiative power which the People of the State of Washington reserved to themselves in their State Constitution, the voters of the State of Washington enacted a top-two primary law that the Washington State Grange had drafted to comply with *Jones*. That law makes the State primary a contest to select the two most popular candidates for the November ballot – regardless of party nominations or party selection. That law also allows candidates for certain offices to disclose on the ballot the name of the party (if any) which that candidate personally prefers.

The Ninth Circuit invalidated this top-two primary system in its entirety, holding that the First Amendment (applied to the States through the 14th Amendment) prohibits a State from so allowing a candidate to disclose the name of the party he or she personally prefers on the ballot.

Does the First Amendment prohibit top-two election systems that allow a candidate to disclose on the ballot the name of the party he or she personally prefers?

PARTIES

Petitioner in this Petition: The party filing this Petition is the Washington State Grange. Petitioner was aligned as Defendant-Intervenor in the U.S. District Court and as Appellant in the Ninth Circuit Court of Appeals.

Petitioners in related Petition: The State of Washington, its Attorney General Rob McKenna, and its Secretary of State Sam Reed are filing a related Petition with respect to the same Ninth Circuit decision. They were aligned with the Grange as Defendant-Intervenors in the U.S. District Court and as Appellant in the Ninth Circuit Court of Appeals. The U.S. District Court also substituted the State for the original defendants in this case (several County Auditors).

Respondents to both Petitions: The Respondents are the Washington State Republican Party and its officials Diane Tebelius, Bertabelle Hubka, Steve Neighbors, Mike Gaston, Marcy Collins, and Michael Young; Washington State Democratic Central Committee and its official Paul Berendt; Libertarian Party of Washington State and its officials Ruth Bennett and J.S. Mills. They collectively were aligned as Plaintiffs and Plaintiff-Intervenors in the U.S. District Court and as Appellees in the Ninth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Washington State Grange, which was the sponsor of the voter-approved election law stricken down in this case, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a-34a) is reported at 460 F.3d 1108. Its others orders (App. 101a-111a) are unpublished. The District Court's summary judgment and preliminary injunction opinion (App. 35a-92a) is reported at 377 F.Supp.2d 907. Its permanent injunction order (App. 97a-100a) is unpublished.

BASIS FOR JURISDICTION

The judgment of the Ninth Circuit was entered August 22, 2006. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides: "FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

government for a redress of grievances." U.S. Const., amend. I (App. 112a).

The Fourteenth Amendment of the United States Constitution provides in part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const., amend. XIV, §1.

Before Initiative 872, Washington used a "Montana" party-nominating system which advanced a party candidate to the November general election if "at the preceding primary, the candidate receives ... a plurality of the votes cast by voters affiliated with that party for candidates for that office affiliated with that party." Wash. Rev. Code 29A.36.191 in effect before I-872 (App. 142a).

Under that "Montana" system, the Declaration Of Candidacy submitted to the State stated: "I am a ***candidate of*** the _____ party." Wash. Admin. Code 434-215-012 under the "Montana" system in effect before I-872 (emphasis added) (App. 129a, 131a, 134a).

Initiative 872 changed Washington law to define "partisan office" as follows: " 'Partisan office' means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." I-872, §4 (App. 117a-118a).

Initiative 872 redefined "primary" as follows: " 'Primary' or 'primary election' means a procedure for winnowing candidates for public office to a final

list of two as part of a special or general election...." I-872, §5 (App. 118a).

Initiative 872 then created a top-two primary as follows: "For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second." I-872, §6(1) (App. 118a-119a).

Under that top-two system, the Declaration Of Candidacy submitted to the State stated: "***my*** party ***preference*** is _____." Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (App. 129a, 137a).

Under that top-two system, Washington's election regulations provided: "Pursuant to [Initiative 872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***" Wash. Admin. Code 434-262-012 until federal court enjoined I-872 (emphasis added) (App. 140a).

Other relevant provisions in the Appendix are: full text of Initiative 872 (App. 116a-126a); excerpts from Wash. Const. art. II, §1 (App. 113a-115a); Wash. Rev. Code 29A.04.128 (App. 141a); Wash. Rev. Code 29A.36.191 (App. 142a); and excerpts from Wash. Reg. Emergency Rule 05-11-101 (filed May 18, 2005) (App. 127a-140a).

STATEMENT OF THE CASE

The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343.

1. This Court's Ruling In *Jones*.

This Court struck down California's primary system in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). California's law provided:

(1) a person could declare them self a candidate for any political party's nomination in the primary,

(2) all voters could vote for whichever person they wanted in the primary, and

(3) the person named as each party's nominee on the November general election ballot would be the person with the most primary votes who had declared them self to be a candidate for that party's nomination.

Cal. Elec. Code §15451 (West 1996); *Jones*, 530 U.S. at 570.

This Court held that allowing people to self-declare themselves a candidate for a political

party's nomination in the primary, and then allowing all voters to choose which one of those people would be named as that party's nominee in the November general election, violated that party's right to decide who would (and would not) be that party's nominee. 530 U.S. at 577-78.

The dissent argued that this Court's ruling would significantly restrict the States' ability to adopt new primary systems. 530 U.S. 600-01 (Stevens, J., dissenting).

This Court rejected the dissent's argument, explaining that States have broad latitude to allow all voters to vote for whomever they want in their State primary as long as State law does not make the winner of that primary the party's nominee on the November election ballot. 530 U.S. at 572-73 & n.4.

To confirm that broad latitude, this Court laid down a specific blueprint for how States can structure a constitutional top-two primary. That blueprint confirmed that the ballot in a constitutional top-two primary can include partisan party names (e.g., a partisan name showing nomination by an established party), as long as the result of that primary is "nonpartisan" (i.e., the primary voters select the top two vote getters overall instead of the top vote getter or nominee for each political party):

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and

> voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: ***Primary voters are not choosing a party's nominee.***

530 U.S. at 585-86 (emphasis added).

In short, *Jones* established that the constitutionality of a State's top-two system does not turn on whether State law allows a partisan political party's name to appear on the ballot. Instead, it turns on whether State law specifies the partisan result of selecting the party's nominee for the November general election ballot.

2. Washington Adopts A "Montana" System In Response To *Jones*.

At the time of this Court's decision in *Jones*, Washington's primary law provided:

(1) a person could declare them self a candidate for any political party's nomination in the primary,

(2) all voters could vote for whichever person they wanted in the primary, and

(3) the person named as each party's nominee on the November general election ballot

> would be the person with the most primary votes who had declared them self to be a candidate for that party's nomination.[1]

Since it was similar to California's law, Washington's law was stricken down as well. *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

In response, the Washington Legislature adopted the "Montana" system currently used in twelve States.[2] Under this commonly used system:

(1) a person can declare them self a candidate for any political party's nomination in the primary,

(2) voters must choose the ballot of one party or the other in the primary, and

(3) the person named as each party's nominee on the November general election ballot is the person with the most primary votes who had declared them self to be a candidate for that party's nomination.

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[1] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version); *Reed*, 343 F.3d at 1201; see also the Declaration Of Candidacy under that statute, which provided that the party designation signified that the person was a "candidate of" that political party. WAC 434-215-012 (pre-2003 version) (App. 121a, 131a, 134a).

[2] App. 9a-10a. Those twelve States' statutes are: Mont. Code Ann. §§13-10-209, -301 (2005); Ga. Code Ann. §21-2-224 (2006); Haw. Rev. Stat. §12-31 (2005); Idaho Code Ann. §34-904 (2006); Mich. Comp. Laws §§168.576, .570 (2006); Minn. Stat. §204D.08 (2006); Mo. Rev. Stat. §115.397 (2006); N.D. Cent. Code §16.1-11-22 (2005); Vt. Stat. Ann. tit. 17 §§2262, 2263 (2005); Va. Code Ann. §24.2-530 (2006); Wis. Stat. §§5.58, 5.62 (2005); Wash. Rev. Code §29A.52.151 (2006).

3. Voters Replace The "Montana" System With Initiative 872's Top-Two System.

Washington's voters used the Montana primary system for the first time in September 2004.

Two months later those same voters voted 60%-40% to replace it with the top-two system of Initiative 872. App. 10a. That Initiative was sponsored by the Washington State Grange to comply with this Court's decision in *Jones*,[3] and was enacted into law pursuant to the Initiative power that the People of the State of Washington reserved to themselves in their State Constitution.[4]

Initiative 872 provides that the top two vote getters in the September primary advance to the November general election:

> Section 6(1): .... For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second. (App. 118a-119a.)

Initiative 872 also allows candidates for certain offices to disclose on the ballot the name of the party (if any) which that candidate personally

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[3] The Grange is a grassroots advocacy group for rural citizens and America's oldest farm-based fraternal organization. App. 4a, n.1. And as the Ninth Circuit acknowledged, Initiative 872 was designed to comply with this Court's ruling in *Jones*. App. 110a-111a.

[4] Wash. Const. Art. II, section 1(a) (App. 113a).

prefers. It defines those offices as "partisan offices" to tie the top-two system's "partisan" phrase to the type of office being voted on rather than the type of result that the primary vote produces:

> Section 4: .... "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. (App. 117a-118a.)

Washington issued new State regulations pursuant to this new State statute.

Those new State regulations changed the Declaration Of Candidacy filed by political candidates. The declaration previously in effect for the Montana system had candidates declare themselves to be a ***candidate of*** a political party: "I am a candidate of the _____ party". (App. 129a, 131a, 134a). The new State regulation allows a candidate to only state the name of the party (if any) which he or she ***personally prefers***: "my party preference is _____". (App. 129a, 137a).

Those new State regulations further provided as follows with respect to the primary ballots that included each candidate's personal statement of his or her partisan party preference:

> NEW SECTION Partisan Primaries. Pursuant to [Initiative 872], a partisan primary does not serve to determine the nominees of a political party but serves to

> winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***

App. 140a (Wash. Admin. Code 434-262-012 until federal court enjoined I-872) (emphasis added).

As the Ninth Circuit accordingly noted, Initiative 872 left the political parties free to hold conventions of their own to select party nominees. App. 22a-23a at n.17. And as the record below confirms, that is precisely what the Republican and Democratic parties did during the seven months this Initiative was in effect.

In summary, Initiative 872 replaced the "Montana" system where the primary selected the political parties' candidates for the November ballot with a top-two system where the primary selects the two most popular candidates for the November ballot. And for certain offices (defined as "partisan offices"), it allows each candidate to tell voters the name of the party (if any) which that candidate personally prefers.

4. Ninth Circuit Overturns The Voters' Enactment Of Initiative 872.

a. U.S. District Court Proceedings.

The Washington State Republican Party filed a facial challenge to the constitutionality of Initiative 872 in May 2005. App. 52a. The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343.

The Washington Democratic and Libertarian parties intervened as plaintiffs. App. 10a-11a.

The Initiative's sponsor (the Washington State Grange) intervened as defendant, as did the State of Washington with its Attorney General and Secretary of State. App. 10a-11a. The District Court also substituted the intervenor-State for the County Auditors who had originally been named as defendants. App. 11a.

In July 2005, the District Court entered summary judgment invalidating Initiative 872 and enjoining its implementation. App. 11a.

b. Ninth Circuit Proceedings.

The Grange and State both appealed. The Ninth Circuit consolidated this matter under the Grange's appeal, and ultimately assigned this Washington case to a Ninth Circuit panel from Southern California (Pasadena). App. 103a-104a, 3a.

c. Ninth Circuit Decision.

The Ninth Circuit recognized that for the purposes of this facial challenge, it had to assume "the ballots clearly state that a particular candidate 'prefers' a particular party". App. 24a-25a at n.20.

The Ninth Circuit also recognized that allowing a candidate to tell voters the name of the party he or she personally prefers gives voters important information about that candidate – noting that such a preference statement gives voters a shorthand description of the candidate's views "on matters of public concern" as well as the candidate's "substantive and ideological positions". App. 19a-21a, 27a, 29a. The Ninth Circuit therefore acknowledged that candidates have a fundamental right to express their political party preference. App. 26a.

The Ninth Circuit nonetheless concluded that Initiative 872 was unconstitutional for two basic reasons.

First, it held that Initiative 872 is not the type of top-two primary allowed by *Jones* because the top-two system specified in *Jones* was a "true" nonpartisan primary without any party names appearing on the ballot. App. 30a. The Ninth Circuit struck down this Initiative "because the primary under Initiative 872 is not the kind of nonpartisan election *Jones* contemplated." App. 15a.

Second, the Ninth Circuit held that the First Amendment prohibits States from allowing a candidate to disclose the name of the party he or she prefers <u>on the ballot</u> because such speech by the

candidate "occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot." App. 20a. The Ninth Circuit warned that a candidate might not tell the truth – offering a hypothetical where maybe a "Candidate W" might not be candid about which party he really prefers, and positing that allowing such a "Candidate W" to tell voters the name of the party he prefers "may" be misleading to a voter who thinks he is instead the candidate which the party prefers, agrees with, selected, or nominated. App. 22a-26a. Concluding that Washington voters might be mislead by the candidate "preference" statement allowed by the Initiative measure they had enacted, the Ninth Circuit struck that Initiative down.

REASONS FOR GRANTING THIS PETITION

This case concerns the lifeblood of democracy in our country: State-run elections.

And this case's central issue boils down to the fundamental distinction between two First Amendment rights: a political party's associational right to control the selection of the name of the person who is that party's ***nominee***, and a political candidate's free speech right to state the name of the party he or she personally ***prefers***.

This Court should grant review because the Ninth Circuit panel in this case failed to recognize this significant distinction. Instead, its decision imposes upon the 59 million Americans living within the Ninth Circuit a judicial edict that:

(1) Contradicts this Court's ruling in *Jones*. The Ninth Circuit's decision holds that if a top-two primary system allows party names to appear on the ballot, then it is unconstitutional even when that system has the nonpartisan result of selecting the top two vote getters over all.

(2) Turns this Court's First Amendment jurisprudence on its head. The Ninth Circuit's decision interprets the First Amendment to be a gag that prohibits States from allowing candidates to provide voters a highly relevant piece of information about themselves on the ballot.

(3) Disregards our Constitution's separation of powers and federalism. The Ninth Circuit's decision reaches out and strikes down a voter-approved State law on a State issue by resorting to a hypothetical politician who "might" not be candid and speculation that some State voters "may" not understand the "preference" statement in the Initiative measure they voted for.

(4) Has immediate nationwide significance even beyond the 20% of Americans who live within the Ninth Circuit's geographic domain. That is because the political parties insist that the Ninth Circuit's decision also makes the "Montana" system currently used in a dozen States unconstitutional.

1. The Ninth Circuit's Decision Contradicts This Court's Ruling In *Jones*.

This Court reaffirmed in *Jones* that "States have a major role to play in structuring and monitoring the election process, including primaries." 530 U.S. at 572. This Court accordingly laid down a blueprint for a constitutional top-two primary that States can tailor to their particular circumstances and adopt. 530 U.S. at 585-86.

The Ninth Circuit's decision is based on the premise that *Jones* mandates a "true" nonpartisan primary without any party names appearing on the ballot. App. 30a.

But that premise is factually incorrect. The blueprint laid down in *Jones* expressly noted the option of allowing the ballot to include partisan party names (e.g., a partisan name showing nomination by an established party). 530 U.S. at 585-86.

Nor is the Ninth Circuit's premise consistent with this Court's ruling.

The crucial characteristic of the constitutional top-two primary specified in *Jones* was not the absence of any partisan party name appearing on the primary ballot. Rather, this Court held that the one crucial characteristic is that State law provide a nonpartisan result by having primary voters select the top two vote getters overall instead of the top vote getter for each political party:

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include

> nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: ***Primary voters are not choosing a party's nominee.***

Jones, 530 U.S. at 585-86 (emphasis added).

Initiative 872 provides that kind of top-two system. Unlike the California law struck down in *Jones* and the cases upon which that decision relied, Initiative 872 expressly provides that primary voters are selecting the top two vote getters overall for the November general election, and that those primary voters are <u>not</u> choosing any political party's nominees.[5]

Initiative 872 was specifically drafted and enacted to comply with this Court's ruling in *Jones*. This Court should grant review because the Ninth Circuit's decision to nonetheless invalidate that Initiative directly contradicts this Court's ruling.

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[5] *Supra*, pages 8-10. As the Ninth Circuit acknowledged, "*Jones* and the cases it relies upon all share the underlying assumption that only one candidate emerges from a 'partisan' primary as a party's nominee." App. 18a-19a, n.14.

2. The Ninth Circuit's Decision Turns The First Amendment On Its Head.

This Court should also grant review because the Ninth Circuit's decision turns this Court's Constitutional jurisprudence on its head by interpreting the First Amendment to gag – rather than protect – political candidates' speech.

The Ninth Circuit properly acknowledged that candidates have a fundamental right to express their political party preference. App. 26a.

It also acknowledged that allowing a candidate to state the name of the party he or she prefers gives voters important information about that candidate – noting that such a statement can give voters a shorthand description of the candidate's views "on matters of public concern" as well as the candidate's "substantive and ideological positions".[6]

The Ninth Circuit went on to hold, however, that the First Amendment prohibits States from allowing a candidate to make that personal preference statement on the ballot. It reasoned that the Constitution requires States to make primary

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[6] More specifically, the Ninth Circuit noted that such a statement serves as a shorthand term to "signal a candidate's substantive and ideological positions" (App. 27a); provides voters a shorthand description of the candidate's views "on matters of public concern" and can be an "important influence on political opinions and voting" (App. 21a); can be "powerful" since voters might rely upon it in casting their vote (App. 19a); "plays a role in the process by which voters inform themselves for the exercise of the franchise" (App. 27a) and "plays a role in determining which candidates voters select" (App. 20a); and can be informative since a candidate's " 'party preference' conveys to voters" a shorthand designation of his or her views "on matters of public concern" (App. 29a).

ballots a speech-free zone because speech on a ballot "occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot." App. 20a.

The Ninth Circuit's speech-free-zone reasoning ignores the fact that the constitutional primary specified in *Jones* allows the ballot to include speech in addition to the candidate's name, such as a statement by an established political party that informs voters that a particular candidate is that party's chosen nominee. *Jones*, 530 U.S. at 585-36.

The Ninth Circuit's speech-free-zone reasoning also leads to an absurd result. If it is unconstitutional for a State to allow a candidate (who is running for office) to include a shorthand term that gives voters information about that candidate, then it is equally unconstitutional for a State to allow a political party (that is not running for office) to include a shorthand term that gives voters information about that candidate.

Under the Ninth Circuit's speech-free-zone reasoning, no information about the candidate other than his or her name can constitutionally be printed on a State's election ballot. No party preference statement by any political candidate. No nomination statement by any political party. Nothing. Nada. Zip.

While that is not necessarily a result that the Grange would disagree with, it is not a result mandated by the federal Constitution.

Most significantly, the Ninth Circuit's reliance on the informative value of a candidate's personal party preference as a reason to prohibit that personal preference from being on the ballot misses the fundamental purpose of the First Amendment. As this Court explained in *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002), "the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." (Emphasis in original.)

"Protection of political speech is the very stuff of the First Amendment." *Republican Party of Minnesota v. White*, 416 F.3d 738, 748 (8th Cir. 2005). This Court has accordingly declared that the First Amendment's free speech guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971).

This Court has therefore repeatedly recognized that allowing a candidate to tell voters what he or she believes qualifies him or her for public office is a core First Amendment freedom. *Republican Party of Minnesota*, 536 U.S. 765, 781-82 (2002) ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24 (1989) (a ban on speech about individual candidates "directly affects speech which is at the core of our electoral process and of the First Amendment freedoms. .... Indeed, the First Amendment has its fullest and most urgent

application to speech uttered during a campaign for political office.").

Given our Constitution's vigorous protection of unfettered political free speech, this Court established long ago that the First Amendment protects not only truthful and accurate speech in the political arena, but also exaggeration, vilification, and outright false statements. *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940); accord, *Public Disclosure Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State law cannot prohibit falsity in political debate).

The Ninth Circuit's reasoning thus turns our Constitution on its head, reading the First Amendment's paramount protection of political speech to instead be a restriction that grants political organizations the power to control or censor the free speech of persons running for public office. As this Court explained in *Republican Party of Minnesota*:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. ... [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. It is simply not the function of government to select which issues are worth discussing or

> debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Republican Party of Minnesota, 536 U.S. at 781-82 (internal quotation marks & citations omitted; italics & ellipses in original).

In short, there is no basis in law or our Constitution for the Ninth Circuit's conclusion that the First Amendment requires States to make their election ballots a speech-free zone where a candidate is not allowed to tell voters the name of the political party (if any) which that candidate personally prefers. To the contrary, this Court's First Amendment jurisprudence confirms that if a State chooses to allow candidates to make that disclosure to voters on the ballot, then the First Amendment protects that speech from the type of prior restraint that the Ninth Circuit effectively issued in this case by striking down Initiative 872 before a single ballot was even printed pursuant to that State law.

This Court should grant review because the Ninth Circuit's decision conflicts with the First Amendment free speech decisions of this Court.

3. The Ninth Circuit's Reaching Out To Strike Down This State Law Based On Hypothetical Speculation Transcends Federalism And Judicial Restraint.

a. Separation of Powers.

Separation of powers between the executive, legislative, and judicial branches is a bedrock foundation of our democracy. This Court has therefore repeatedly recognized that the judicial branch cannot re-write or ignore language that the legislative branch has enacted.[7]

The Ninth Circuit's decision violated this fundamental separation of powers principle by ignoring the language of Initiative 872 and the accompanying State election regulations. It ignored Initiative 872's numerous provisions that a party name on the ballot is a statement by that candidate of that ***candidate's preference*** (if any) – not a statement by the political party that that political party selected, agrees with, or nominated that

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[7] E.g., *Ayotte v. Planned Parenthood of Northern New England*, --U.S.--, 126 S. Ct. 961, 968, 163 L. Ed. 2d 812 (2006) ("Mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrite[ing] state law'"); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 261 (1964) ("This is a matter of policy that rests entirely with the Congress not with the courts"); accord *State v. Chapman*, 998 P.2d 282, 289 (Wash. 2000) (Washington law holds that a statute "means exactly what it says"). With respect to Initiatives in general, note that Washington law provides that "When the people approve an initiative measure, they exercise the same power of sovereignty as the Legislature does when it enacts a statute." *McGowen v. State*, 60 P.3d 67, 72 (Wash. 2002).

candidate.[8] And the Ninth Circuit similarly ignored the accompanying Washington Administrative Code's express provision that under Initiative 872 "***Voters at the primary election are not choosing a political party's nominees.***" (App. 140a).

One corollary to the judicial branch's separation from (and respect for) the legislative branch is the principle that courts construe a statute to be constitutional if possible so as to avoid striking it down.[9]

The Ninth Circuit, however, did the exact opposite with Initiative 872. Instead of determining the facial validity of this statute by looking at the

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[8] E.g., Initiative §4 ("candidate may indicate a political party preference"), §7(3) ("if a candidate has expressed a party or independent preference"), §9(3) ("a place for the candidate to indicate his or her ... party preference"), §12 ("his or her party preference") (App. 117a, 119a, 121a, 123a).

[9] E.g., *Scales v. U.S.*, 367 U.S. 203(1961). The challenger in *Scales* claimed that a federal statute criminalizing membership in the communist party violated his First Amendment freedom of association. 367 U.S. at 224. Noting that federal courts avoid construing a statute to be unconstitutional when possible, this Court interpreted that statute to have an implied element of specific intent to overthrow the government through violence – thereby preserving the statute's constitutionality. 367 U.S. at 221-22 & 229. Accord, *U.S. v. Booker*, 125 S.Ct. 738, 764 (2005) (courts "must refrain from invalidating more of the statute than is necessary. Indeed, [courts] must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute") (internal quotation marks & citations omitted); *Citizens for Responsible Wildlife Management v. State*, 71 P.3d 644, 650, 655-56 (Wash. 2003) (construing Initiative to preserve its constitutionality); *McGowen v. State*, 60 P.3d 67, 75-76 (Wash. 2002) (severing unconstitutional provision from Initiative to preserve it from being stricken down in its entirety); *Personal Restraint Petition of Matteson*, 12 P.3d 585, 589 (Wash. 2000) ("Whenever possible, it is the duty of [the] court to construe a statute so as to uphold its constitutionality").

face of its statutory provisions, the Ninth Circuit stretched to construe this statute as being unconstitutional in its entirety by making up a hypothetical about a "wild-eyed radical who purports to prefer the Republican Party" – a hypothetical that ultimately ended with the speculative conclusion that allowing that "wild-eyed radical" to state his party preference on the ballot "may" be misleading to a voter who thinks the party he "purported" to prefer in turn preferred, agreed with, selected, or nominated him. App. 22a-26a.

Invalidating legislation based on a hypothetical and speculation disregards the judicial branch's duty to construe measures as constitutional if at all possible. And in this case, the hypothetical's presumption that Washington voters "may" be confused or misled by what the "preference" statement on the ballot really means also disregards the well established principle in Washington that citizens are deemed to know what the law says[10] – a principle that makes particular sense in this case because the law that voters are being deemed to

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[10] E.g., *Barson v. DSHS*, 794 P.2d 538, 54 n.1 (Wash.App. 1990) (appellant is presumed to know the law governing the appellate process, and thus the import of statements by the administrative law judge); *In re Estate of Niehenke*, 818 P.2d 1324, 1329 (Wash. 1991) (testator is presumed to the law governing wills, and thus the effect of Washington's anti-lapse statute); *Watson v. Wash. Preferred Life Insurance*, 502 P.2d 1016, 1020 (Wash. 1972) (shareholders are presumed to know the law governing corporations, and thus the voting effect of their absence at a shareholders meeting); *Terrace Heights Sewer District v. Young*, 473 P.2d 414, 417 (Wash.App. 1970) (citizen is presumed to know the law governing municipal officials, and thus the limits of those officials' contracting authority); *Grossman v. Will*, 516 P.2d 1063, 1068 (Wash.App. 1973) (person is presumed to know the law governing agency, and thus the scope of opposing counsel's settlement authority).

know is the same law that approximately 3 million of them recently voted on.

b. Federalism.

The Ninth Circuit's resorting to a hypothetical to invalidate Washington's top-two statute not only violated this Court's longstanding jurisprudence on judicial restraint and the separation of powers, it also violated our Constitution's fundamental principle of federalism.

The United States Constitution created a dual system of government under which power is divided between the States and the federal government. E.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 7 Wall 700, 725, 19 L.Ed 227 (1869)).

One purpose of this dual sovereignty or federalism is to protect citizens and State legislatures from federal officials exercising too much power.[11]

Another purpose of this dual sovereignty is to allow States the freedom and flexibility to tailor solutions to matters of local concern. This Court has therefore "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern",

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[11] See *U.S. v. Morrison*, 529 U.S. 598, 616 (2000) ("The Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"); *Gregory*, 501 U.S. at 458 (the federal government is limited to the powers in the Constitution, while all remaining powers are reserved to the States or the People); *Printz v. U.S.*, 521 U.S. 898, 934 (1997) (protection of State legislatures from forced federal direction).

and has recognized "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (quoting *New State Ice v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J. dissenting)).

Structuring election laws is one such area of local concern firmly within the province of the States. E.g., *Jones*, 530 U.S. at 572 ("States have a major role to play in structuring and monitoring the election process, including primaries"); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (States have "broad powers" to enact laws governing elections); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)).

Thus, as the State election statutes underlying the various cases cited in the Ninth Circuit's decision illustrate, various States have structured their primary systems in a variety of different ways. For example:

- The Connecticut statute in *Tashjian* said a candidate's listing on the named party's primary ballot confirmed that candidate's approval by that party's nominating convention.[12]
- The Ohio statute in *Rosen* said the party name on the ballot identified "the name of the

[12] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220-21 (1986).

political party by which the candidate was nominated or certified."[13]

- The Georgia statute in *Duke* said a candidate's listing on the named party's primary ballot confirmed that candidate's approval by that party.[14]
- The invalidated Washington law in *Reed* said the party's name on the ballot determined whether the candidate was running as a candidate of that party for that party's spot on the November ballot.[15]
- The invalidated California law in *Jones* said the party's name on the ballot identified the party of which the candidate would be "the nominee ... at the ensuing general election".[16]

Citing cases and materials discussing such laws in other States, the Ninth Circuit's decision makes observations about the basic function of political parties in other States, how other States use the term "nonpartisan", how other States do not let candidates use the ballot as a forum for political expression, and how primaries in other States are designed to be a meeting of party voters to nominate

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[13] Ohio Rev. Code §3505.03 (1986); *Rosen v. Brown*, 970 F.2d 169, 174 (6th Cir. 1992).

[14] Georgia Code §21-2-193 (1987); *Duke v. Cleland*, 954 F.2d 1526, 1527 (11th Cir. 1992); *Duke v. Massey*, 87 F.3d 1226, 1230 (11th Cir. 1996).

[15] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version); *Reed*, 343 F.3d at 1201; see also the Declaration Of Candidacy under that statute, which provided that the party designation signified that the person was a "candidate of" that political party. WAC 434-215-012 (pre-2003 version) (App. 121a, 131a, 134a).

[16] Cal. Elec. Code §15451 (West 1996); *Jones*, 530 U.S. at 570.

a party candidate, standard bearer, or ambassador to the electorate at large. App. 4a-5a, 13a-14a, 17a-20a, 25a-26a, 29a.

The Ninth Circuit's decision then relies upon those observations about the way other States structure their primaries to restrict the way the Ninth Circuit will allow Washington to structure its primary. In so doing, the Ninth Circuit converts the freedom and flexibility that federalism guaranteed to those other States in structuring their State election systems to now be a straightjacket that prohibits the State of Washington from adopting a primary system different from those other States.

For example, the Constitution allows States to structure their primary to select political party nominees for the November general election ballot (as did the State laws in *Rosen*, *Duke*, *Jones*, *Reed*, and *Tashjian*). But that does not mean that Washington must now do so too. Similarly, the Constitution allows States to structure their primary to leave certain information off the ballot (as did the State law in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). But that does not mean that Washington must now do so too.

The Ninth Circuit's invoking the result or function of primary systems in other States to restrict or define the system adopted by Washington State subverts the fundamental "State laboratory" purpose of federalism. It takes what "most" States have done, and then effectively prohibits other States from doing something different. In so ruling, the Ninth Circuit defeats the independence that

federalism grants to the States in our national form of government.

4. This Decision Has Additional Nationwide Significance Because The Political Parties Insist This Decision Renders The "Montana" System Used In A Dozen States Unconstitutional.

This Court should also grant review of the Ninth Circuit's decision because it establishes a reported decision that the political parties insist makes the "Montana" system currently employed by twelve States across our Nation unconstitutional as well.[17]

The Ninth Circuit's decision accordingly does more than simply defeat the voting rights of the voters in Washington who overwhelmingly enacted Initiative 872. It does more than defeat the rights of the 20% of our country's citizens who live within the Ninth Circuit's geographic domain. It also immediately threatens the rights of voters in all twelve States that currently employ the "Montana" primary system. This case accordingly presents an important Constitutional question of immediate and broad national significance.

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[17] The political parties claim that the Ninth Circuit decision's prohibiting a political candidate from stating his or her personal party preference on a *Jones* style top-two primary ballot also prohibits a political candidate from choosing to have his or her name listed on a Montana style primary ballot as well. Cf. App. 97a-100a. And as noted earlier, twelve States currently employ that Montana primary system. Supra note 2.

CONCLUSION

The Ninth Circuit's decision contradicts this Court's ruling in *Jones*, and thereby imposes improper restrictions on the lifeblood of our country's democracy: State-run elections.

It inverts one of the most fundamental rights guaranteed by our Constitution, employing the First Amendment to gag rather than protect free speech.

It resorts to hypothetical speculation and the way other States' primaries are structured to strike down a Washington State law on a State law matter – overriding two bedrock protections of State sovereignty: separation of powers and federalism.

And it has immediate impact not simply on the 59 million Americans living within the Ninth Circuit, but on the twelve States that employ the "Montana" primary system.

The Washington State Grange therefore respectfully requests that this Court review (and reverse) the Ninth Circuit's decision striking down Initiative 872 in its entirety.

RESPECTFULLY SUBMITTED.

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